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FEDERAL COMMUNICATIONS COMMISSION
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March 5, 1998

Hon. William E. Kennard
Chairman, Federal Communications Commission
1919 M Street NW
Washington, D.C. 20554

CC Docket No. 98-11, 98-26, 98-32

In Re: BOCs Package More Red Herrings: "Section 706 Forbearance"

Dear Chairman Kennard:

Bell Atlantic, other Bell Operating Companies (BOCs, and their apologists have come up with yet another red herring to divert the attention of regulators, Congress and other public policy makers from the fact that they are failing to comply with the Telecommunications Act of 1996 by making their network facilities available for reasonable compensation to rivals and by interconnecting their networks with the networks of competitors seamlessly and on a financially viable basis.

The latest red herring is this: Investment in "new technologies" needed to keep the U.S. telecommunications system at state-of-the-art levels is not happening, and won't happen because the Act makes it uneconomical for BOCs to invest. Therefore, the FCC should use its "Section 706" forbearance authority to exempt new technologies from the fundamental requirements imposed by the Act on incumbent local exchange carriers. To this end, Bell Atlantic has filed a Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services.[1]

What's wrong with this picture? Everything.

First, the so-called economic or "public interest" grounds for the Petition rest on the false assertion that investment in innovation is slow. According to any one of several possible yardsticks, investment has accelerated during the last two-three years. Qwest communications, for example, has committed to a multi-billion dollar national broadband network spanning 16,000 miles in 125 cities, and serving over 80 percent of the originating data and voice traffic in the United States. Over 3,500 miles of that network currently are operational, accord to Qwest's

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[1] CC Docket 98-11 (January 26, 1998), "Petition".

website. As the Petition notes, cable television companies spent $6.9 billion on capital improvements in 1996, wireless companies spent $8.5 billion and the three largest CLECs spent $1.2 billion.[2] Cable companies, according to NCTA, have committed $14 billion through the end of the century to new technology for voice, video, data and wireless telecommunications. Superfast cable modems for Internet access are about to hit the retail market. The world marvels at the pace at which capacity is being added in the aggregate to the Internet Backbone, as well as to local area networks. Rather than be dismayed by occasional slowdowns on congested backbone networks, we should be stunned by the ability of those networks to handle the millions of additional transactions experienced each month.

By comparison, perhaps, BOCs themselves are indeed investing relatively little. Bell Atlantic spent a mere $300 million on capital improvements to accommodate growing use of on-line services in 1997.[3] The BOCs are well known for not deploying new technologies, and their monopoly position *vis à vis* 99% of all retail consumers is the most plausible explanation for the continuation of this risk aversion.

Second, the assertion that Bell Atlantic's failure to invest in broadband is due to regulations that require incumbent local exchange carriers (ILECs) to make available their unbundled facilities to rivals is false. Or, it may be true, but if so, it is for **uneconomic** reasons the BOC chooses. The BOCs have everything to gain by building new facilities because not only can they serve retail customers with better quality service, but their wholesale carrier customers will pay them their actual costs to use those facilities. Since they are making the investment today, their **actual cost is forward looking cost**, the pricing standard recommended by the FCC and being applied by most state regulatory agencies. Under the terms of the Act, such costs may include a **return to capital**-- that is "a reasonable profit."[4] In fact, competitors' willingness to lease broadband transmission or packet-switching capabilities from an incumbent **reduces the incumbent's investment risk** because revenues to pay down the investment do not come exclusively from retail end users whose expenditures may fluctuate with economic conditions.

It should be patently evident that a really savvy incumbent local exchange carrier would be racing to build packet-switched broadband networks at the lowest possible cost just to be able to lease the facilities to competitors and discourage or foreclose competitors from building their own. That is the only way, given the national pro-competition policy, that the ILECs could preserve their market position, or at least contain the erosion of their market share. **If indeed the BOCs and other ILECs are not investing, it can be for one reason only: they know they cannot build as efficiently as the competitors can.** Since they don't want to be penalized by customers and even more importantly, by the stock market, for not upgrading their facilities, they have to blame their lack of investment on external causes.

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[2] Attachment 2, Bell Atlantic Petition at 44.

[3] Attachment 2, Bell Atlantic Petition at 44.

[4] 47 U.S.C. §252(d)(1).

Fishing around for an external solution to the consequences of their own bad judgment, the BOCs hooked Section 706, in Title VII. This Title, "Miscellaneous Provisions" was directed at bringing advanced capabilities to all Americans, *especially schools and classrooms*. The removal of barriers to infrastructure investment promoted by Section 706 was intended to follow the achievement of other portions of the Act, including implementation of Universal Service as required by Section 254 of Title II. Section 706(b) gives the FCC 30 months from the date of enactment to begin a proceeding to determine whether its rules comply with the requirement "to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability...." The FCC still has six months before it need open such a proceeding.

Further, Section 706(b) says that if the FCC finds at the end of its investigation that advanced capabilities are not being deployed to benefit all Americans, the FCC shall take whatever measures necessary, "by removing barriers to infrastructure investment *and by promoting competition in the telecommunications market*" (emphasis supplied). The BOCs conveniently disregard the latter portion of the directive to the FCC.

The BOC claim that Section 706 requires, encourages or even allows the FCC forbearance from applying the interconnection and unbundling standards of the Act to advanced or innovative telecommunications is totally at odds with the plain language of the Act throughout. Even were the FCC to remove barriers to infrastructure investment by means of forbearance, the forbearance could not extend to the suspension of the requirements of Sections 251, the bottleneck-breaking heart of the Act, or Section 271, the *quid pro quo* to be given BOCs when their bottleneck is broken.

Nowhere in this carefully crafted legislation is there the slightest hint that any facilities used for any type of telecommunications service should be exempted from the requirements of these sections. **Were broadband or packet-switched facilities to be so exempted, the Act would be rendered meaningless**, because technology is going to make circuit switching obsolete for most if not all telecommunications services, sooner rather than later. The Congress need not have spent four years crafting this legislation to see it effectively nullified by technological change in an equivalent time frame.

Finally, the Commission is expressly prohibited from forbearing with respect to the application of Section 271, as Bell Atlantic requests. Irrespective of the nature of facilities used by Bell Atlantic to provide interLATA service, it cannot do so without Section 271 authorization following compliance with the detailed requirements of the 14-point competitive checklist. Bell Atlantic may not escape the core requirements of Section 271. Likewise, Bell Atlantic may not provide interLATA services over any facilities unless it does so through a separate affiliate, pursuant to Section 272. The FCC cannot forbear from enforcing Congressional intent on this matter.

The FCC also cannot eliminate LATA boundaries as requested by Bell Atlantic until Bell Atlantic has obtained its Section 271 authority and applied it in accordance with Section 272.

This latest foray into economic fantasy and legal falsity in order to escape essentially all the

Act's pro-competitive provisions should come as no surprise. Rather than seek efficient ways to implement the Act, BOCs bend every effort to obfuscating, redefining, defying, appealing, and ignoring its requirements. The pity is that the subsequent regulatory and legal entanglements hobble consumers' opportunity to choose the telecommunications carrier of their choice. Equally regrettable is the fact that whenever a BOC throws a red herring in the path of competitive choice, it adds regulatory and administrative costs to the price of telecommunications services, no matter who provides them.

Sincerely yours,

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani